SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965.

No. 264

CONTRACT CARRIERS, INC. AND JOSEPH L. McCORKHILL,

Petitioners,

vs.

JOHN ANTHONY MARKIEWICZ, A MINOR BY HIS FATHER AND NEXT FRIEND, EDWARD MARKIEWICZ, AND EDWARD MARKIEWICZ AND JENNIE MARKIEWICZ, AND THE GREYHOUND CORPORATION AND ROBERT L. SCHLAGENHAUF,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENTS JOHN ANTHONY MARKIEWICZ, EDWARD MARKIEWICZ AND JENNIE MARKIEWICZ IN OPPOSITION.

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Respondents, John Anthony Markiewicz, Edward Markiewicz and Jennie Markiewicz, respectfully pray that the petition herein for a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Seventh Circuit entered in the entitled case on March 24, 1966, be denied.

OPINION BELOW.

The District Court for the Southern District of Indiana rendered judgment without opinion. The opinion of the United States Court of Appeals for the Seventh Circuit affirming the judgment is reported in 358 F. 2d 26.

JURISDICTION.

The grounds on which the jurisdiction of the Court is involved are properly set forth in the Petition.

QUESTIONS PRESENTED.

1. Did the Seventh Circuit Court of Appeals fulfill its obligation as a reviewing Court in affirming the judgment of the lower court?

2. Did the Seventh Circuit Court of Appeals depart from the accepted and usual course of judicial review?

3. Should this Court review by certiorari evidence or inferences drawn from it bearing on the issues of causation and negligence?

4. Should this Court review by certiorari the judgment of the United States Court of Appeals for the Seventh Circuit affirming the Judgment of the District Court for the Southern District of Indiana under the facts here asserted?

5. Did the Seventh Circuit Court of Appeals fulfill its obligation as a reviewing Court in reviewing the findings of the District Court and the record and determining said findings had sufficient support in the record?

6. Did the Seventh Circuit Court of Appeals fulfill its obligation as a reviewing Court in determining that correct legal standards had been applied by the trial judge?

STATUTES AND FEDERAL RULES INVOLVED.

Irrespective of the assertion of the Petitioners, only the following Statutes and Rules are involved here:

§47-2006 Burns' Indiana Statutes Annotated (1952 Replacement Supp.):

> "No person shall drive a motor vehicle at such a low speed as to impede the normal and reasonable movement of traffic, except when reduced speed is necessary for safe operation, or in compliance with the law."

Rule 52(a) Federal Rules of Civil Procedure:

> "(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b)."

Rule 19. Supreme Court of the United States Revised Rules.

> "Considerations governing review on certiorari.
>
> 1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important

reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:

(a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decision of this court.

(b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision.

2. The same general considerations outlined above will control in respect of petitions for writs of certiorari to review judgments of the Court of Claims, of the Court of Customs and Patent Appeals, or of any other court whose determinations are by law reviewable on writ of certiorari."

STATEMENT OF FACTS.

The Respondents Markiewicz were passengers on a Greyhound Bus operated by Robert L. Schlagenhauf, when it became involved in a collision with a tractor-trailer unit operated by Joseph L. McCorkhill, an employee of Contract Carriers, Inc. The collision occurred on July 13, 1962, at about 1:05 A.M. on U. S. Highway 40, in the State of Indiana, at nighttime—both vehicles were traveling in an easterly direction when the right front of the bus collided with the left rear of the tractor-trailer unit. The highway at the point of collision was a four-lane highway with the

two eastbound lanes separated from the two westbound lanes by a grass divider.

McCorkhill had experienced acceleration problems for 100 miles prior to the accident. The farther the vehicle was operated, the slower the vehicle went. The speed of the McCorkhill vehicle at the time of the occurrence was 20-30 miles per hour. McCorkhill was advised by his employer to have his vehicle repaired, but continued on. McCorkhill said he was advised to continue on. The cause of the inability to increase forward speed was due to a defective member of the accelerator which had been experienced by Contract Carriers and McCorkhill before, and by reason of such experience Contract Carriers had provided a replacement part in the glove compartment of the vehicle. McCorkhill did not replace the defective part with the spare furnished and did not equip the vehicle with any warning devices of his continuous slow speed. Schlagenhauf, operating the bus, approached from the rear a tractor-trailer unit operated by witness Louie L. Stone, signaled his intention to pass, pulled into the passing lane and proceeded to pass. Upon passing the Stone vehicle Schlagenhauf signaled he was returning to the right-hand lane, saw red lights down the road ahead of him, started to return to the right-hand lane, saw the left rear of the Contract Carriers unit, swerved hard left and collided with about two feet of the left rear of the Contract Carriers vehicle.

The cause was initially submitted in the District Court to a jury, but upon the stipulation of all parties establishing the damages to be recovered by the respondents, providing responsibility be estabilshed, the cause was withdrawn from the jury and submitted to the Court with respect to liability issues only. Findings of fact and conclusions of law were made and judgments entered against Contract Carriers, Inc., Joseph L. McCorkhill, Robert L. Schlagenhauf, and The Greyhound Corporation. Petition-

ers, Joseph L. McCorkhill and Contract Carriers, Inc., appealed to the Seventh Circuit Court of Appeals. Respondents, Robert L. Schlagenhauf and The Greyhound Corporation, did not appeal the judgments rendered against them.

A three-judge panel of the Seventh Circuit Court of Appeals affirmed the lower court's decision with Judge Duffy dissenting. A Petition for Rehearing En Banc was filed and denied by the Court sitting en banc by a six to one decision with Judge Duffy dissenting.

REASONS FOR DENYING THE WRIT OF CERTIORARI.

I.

This Court Should Not Review by Certiorari Evidence or Inferences Drawn From It Bearing on the Issues of Causation and Negligence Nor Review Concurrent Findings of Fact of Two Courts Below in Absence of a Very Obvious and Exceptional Showing of Error.

This is an ordinary negligence case giving rise, as is the case in every vigorously litigated case of this type, to a conflict in the evaluation of evidence. The only real controversy here is an appraisal of facts on which this Court is being asked to substitute its assessment for that of the two courts below.

What the Petitioners seek of this Court is a trial *de novo* —this Court sitting as the trial judge, as fact finder, reviewing the evidence, drawing inferences therefrom and substituting this Court's interpretation of the facts for the interpretation concurred in and applied by the District Court and the Seventh Circuit Court of Appeals. That this is what the petitioners seek is made clear in Paragraph I of the Petitioners' Argument at page 10, wherein the Petitioners request this Court "to consider the facts and apply the law."

Jurisdiction under 28 USC, Section 1254(1) was not conferred upon this Honorable Court to afford the defeated party in the Court of Appeals another hearing. *Magnum Import Co.* v. *De Spaturno Coty.* (1922), 262 U. S. 161. This Court is not the place to review a conflict of evidence. *NLRB* v. *Pittsburgh S. S. Co.*, 340 U. S. 498, 503, or to review evidence and discuss specific facts. *United States of*

America v. *James J. Johnson*, 268 U. S. 220, 227; *General Talking Pictures Corp.* v. *Western E. Co., Inc.*, 304 U. S. 175, 178.

Negligence cases are the most common type of litigation filed in state and federal courts today. State and federal dockets are bursting with such litigation. No scientific or precise method can be devised to test the sufficiency of the evidence in a negligence case. If this Court undertook to sit as fact finder, weigh the evidence, draw inferences and review negligence cases, this Court would destroy the entire appellate review structure by opening Circuit Court decisions to attack as a matter of course by every dissatisfied party and reduce this Court's already crowded docket to hopelessness. Jurisdiction of this Court pursuant to Rule 19 of the Rules of the Supreme Court must be preserved for those cases for which there are special and important reasons for the exercise of the Court's discretion. Cases involving only the interpretation of facts bearing on the issues of causation or negligence are outside the consideration for which this Court exercises its discretionary jurisdiciton.

The Petitioners cite *McAllister* v. *U. S.* (1954), 348 U. S. 19 as authority for this Court reviewing the evidence in this case. However, in McAllister the Court was not reviewing the concurrent findings of two courts below and thus held where the Court of Appeals reverses the judgment of the District Court the Supreme Court sits in the same position as the Court of Appeals, and the question is whether the findings of the District Court are clearly erroneous. In the case at hand this Court sits in the position of reviewing the concurrent findings of the District Court and the Court of Appeals. As was stated in *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.* (1940), 336 U. S. 271, 275, "a court of law, such as this Court is, rather than a

Court for correction of errors in fact finding, cannot undertake to review the concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error."

The Petitioners have wholly failed to make a showing of obvious and exceptional error and have wholly failed to state any important or special reason why this Court should review on certiorari the judgment of the Circuit Court of Appeals.

II.

The Seventh Circuit Court of Appeals Followed Accepted and Usual Course of Judicial Proceedings in Affirming the District Court.

The Petitioners assert the Court of Appeals departed from the accepted and usual course of judicial procedure in that the Court of Appeals "refused to review the findings of fact to determine if they were supported by the quantity and quality of evidence required by federal procedure" (Petition page 11), and failed to review the legal standard applied by the trial court (Petition page 15).

First, what was the obligation of the Court of Appeals reviewing the lower court judgment?

We submit the questions before the Court of Appeals were: (1) Are the trial court's findings clearly erroneous? (2) Are the trial court's findings supported by the evidence and reasonable inferences therefrom? (3) Did the trial court correctly apply the law?

In the case at bar the findings of the District Court which are attacked by the Petitioners and were made contested issues on appeal were founded essentially upon the testimony of two witnesses, Joseph L. McCorkhill and Robert L. Schlagenhauf, both of whom were the key witnesses in the cause and both of whom appeared in open court before

the trial judge for a total of two and one-half days of intensive oral examination. It was the duty of the trial court to weigh the evidence and determine the credibility of the witnesses. Such was not the function of the reviewing court.

Koehler v. *Ellison,* (C. A. 7th, 1955), 226 F. 2d 682, 685.

Cuthill v. *Ortman-Miller Machine Co.,* (C. A. 7th, 1957), 249 F. 2d 43, 47.

For the Court of Appeals to substitute its judgment on the oral evidence would have made the Appellate Court the trier of the facts, which the Court of Appeals had previously determined was not its function.

Wood v. *Reznik,* (C. R. 7th, 1957), 248 F. 2d 549.

Wolverine Insurance Co. v. *Eldridge,* (C. A. 7th, 1964), 326 F. 2d 748.

The function of the Court of Appeals was to determine whether the findings of the District Court were clearly erroneous,

McAllister v. *U. S.,* (1954), 348 U. S. 19.

Leatherman v. *Gateway Transp. Co.,* (C. A. 7th, 1964), 331 F. 2d 241, 244.

Clark v. *Travelers Indemnity,* (C. A. 7th, 1963), 313 F. 2d 160.

and in fulfilling that function the Court of Appeals should have given due regard to the opportunity of the trial judge to judge the credibility of the witnesses, should not reject any reasonable inference drawn by the trial judge and the trial judge's findings should not be disturbed unless they could not be sustained upon any rational view of all the evidence or unless the law was incorrectly applied.

Smoczynski v. *United States,* (C. A. 7th, 1965), 352 F. 2d 44, 47.

Alster v. *Alster & Associates, Inc.*, (C. A. 7th, 1963), 319 F. 2d 54.

First National Bank of Colorado Springs v. *McGuire* (C. A. 7th, 1950), 184 F. d 620.

Did the Court of Appeals fulfill its function?

From a review of the Opinion of the Court of Appeals (Petition PP. 2a-9a) it is apparent that the reviewing court in concurring with the judgment of the trial court carefully reviewed the record, found the findings of the trial judge had sufficient support in the record, and further found the trial judge had applied the proper legal standards as determined by Indiana law.

The District Court had found:

> "11. The low speed of the tractor-trailer unit as determined in these findings of fact impeded the normal and reasonable movement of traffic at the time and place in question and its slow speed was deceptive and misleading to the safety of those operators approaching from the rear of the unit including the operator of the bus and Mr. Stone, the operator of the other tractor-trailer, who was barely able to avoid the colliding vehicles."

and concluded that McCorkhill and Contract Carriers, Inc. had failed to comply with the standard established by Burns' Indiana Statutes Annotated, Section 47-2006. (Opinion of Ct. of App.—Petition P. 5a).

Upon a review of the evidence, as outlined by the Court of Appeals (Petition P. 6a), the Court of Appeals stated:

> "Although the mistake in judgment was that of Schlagenhauf, it does not follow that the collision, as a matter of law, must necessarily be attributed solely to him . . . Further, the normal flow of traffic does not exclude a situation in which the operator of one vehicle may have but a few seconds in which to arrive at an evaluation as to the speed and relative location

of another vehicle on the highway. Under such circumstances, a vehicle proceeding at an unusually slow speed, that is, unusual in light of the conditions of the road, the hour of travel, the amount of traffic on the highway, and the type of vehicle involved, may, by the very unexpectedness of its speed, mislead the operator of another vehicle who lacks opportunity for a more prolonged observation . . . In light of his limited opportunity for observation of the Contract Carriers, Inc. vehicle, his error may reasonably be found to have been induced also by the fact that the tractor-trailer was being operated at an unusually low speed—possibly as low as 20 miles per hour—of which its lights and general appearance on the highway gave no indication." (Petition PP. 6a-7a).

The Court of Appeals also concluded upon a review of the evidence, "Consideration of the record discloses that the operation of the Contract Carriers, Inc. vehicle in the manner and under the circumstances shown here may be found to have contributed to Schlagenhauf's error in judgment as to the relative position and speed of the vehicle, and that the operation of said vehicle thereby constituted a concurring, substantial factor, together with the negligence of the bus, in bringing about the harm to plaintiffs." (Petition PP. 7a-8a.)

The Court of Appeals further found that the Contract Carriers, Inc. vehicle proceeding upon the highway with knowledge of the impairment of its capacity for attaining reasonable speed and without providing said vehicle with additional lights or warning devices to alert others to this condition may be deemed to constitute negligence. (Petition P. 8a.)

Thus the Court concluded upon the Court's own thorough review of the record that the findings of the District Court had sufficient support in the record.

Did the Court of Appeals review the legal standard applied by the trial court? The Court considered and approved the standard applied by the District Court as clearly expressed by the Court in its opinion (Petition P. 8a) where the Court considering the record stated the manner in which the Contract Carriers, Inc. unit was being operated may be found to have contributed to Schlagenhauf's judgment error and thereby constituted a concurring substantial factor with the negligence of the driver of the bus, and upon this basis went on to state: "The standards of causal negligence under Indiana law are met thereby. *Huey* v. *Milligan*, 242 Ind. 93, 175 N. E. 2d 698, 703 (1961). The manner of operation of said vehicle as determined by the District Court further may be deemed to have impeded the normal and reasonable flow of traffic in violation of § 47-2006, Burns' Indiana Statutes." (Petition P. 8a.)

In view of the fact the Court of Appeals obviously reviewed and approved the legal standards applied by the trial court, the argument presented by the Petitioners in paragraph II C is inapplicable. (Petition PP. 14-15.)

However, the citation by the Petitioners of *U. S.* v. *Singer Mfg. Co.*, (1963), 374 U. S. 174 and *U. S.* v. *Parke Davis & Co.*, (1960), 362 U. S. 29, direct appeal cases to this Court, and the statement, "Both Singer and Parke Davis held where there are essentially undisputed facts, the application of a standard necessarily presents only a question of law" (Petition P. 15), reflect a continuing error on the part of the Petitioners which the Petitioners attempted to foster upon the Court of Appeals without success and which they now attempt to foster upon this Court.

That basic error is that the case at bar cannot under any circumstances be considered a case of undisputed facts. To argue and contend that this case involved only undisputed facts is wholly unsupported and is an argument conceived out of desperation.

The following are only a few of the key issues which were vigorously controverted and which involved the credibility of the chief witnesses, Schlagenhauf and McCorkhill: (1) Did the operator of the bus observe the Contract Carrier unit before collision? (2) Was the Contract Carriers unit properly lighted? (3) The speed of the truck. (4) The speed of the bus. (5) The condition of the operator of the bus. (6) The condition of the windshield of the bus. (7) The distance between the vehicles. (8) The period of time the operator of the bus had to observe and react. (9) The manner in which the bus was being operated. (10) McCorkhill's denial of the prior conviction for operating a defective vehicle. (11) Where the bus was with respect to the truck when Schlagenhauf observed the lights. (12) The location of the Contract Carriers unit with respect to the lanes of travel. (13) Where the impact occurred. (14) The nature of the defect existing in the Contract Carriers unit. (15) The conflicting testimony of McCorkhill and his employer as to his instructions with respect to the defective vehicle.

The Petitioners purport to set out at page 12 of their Petition a "fair recital" of the evidence upon which the trial court's findings and the Court of Appeals Judgment were based as support for a theory that the lower court decision as well as the concurrent findings of the Court of Appeals were not supported by substantial evidence of probative value.

Consider the evidence upon which the concurrent findings were based: Petitioners were operating their 71,440 pound vehicle, at nighttime at a speed of 20 to 30 miles per hour on four-lane United States Highway 40, in open country, "you can roll through there like an ocean" (Dep. of Louis L. Stone, Plft. Appellee A. 5); Stone testified that McCorkhill told him at the scene of the accident his speed was 20-25 miles per hour (Appellants' A. 115). Mc-

Corkhill had experienced power troubles for over one hundred miles prior to the occurrence, and the closer McCorkhill got to home the slower the vehicle went. (Plft. Appellee A. 6). Contract Carriers had experienced similar difficulty on other occasions (Plft. Appellee A. 21-23), as had McCorkhill, (Plft. Appellee A. 29) and notified its employees of what to do in the event of such a power failure (Plft. Appellee A. 23 and 30) and had in fact placed a spare part in McCorkhill's vehicle (Plft. Appellee A. 30) which he had reason to believe was there (Plft. Appellee A. 30) but which he made no effort to use (Plft. Appellee A. 31) until after the tragic occurrence when he and another driver, not a mechanic, replaced the defective part in a matter of 15 minutes. (Plft. Appellee A. 37-38.) McCorkhill advised his employer his maximum speed was 25-30 miles per hour and testified his employer ordered him to operate on to his destination. (Appellants' A. 196.) That he was ordered on to his destination was denied by the employees of Contract Carriers, Inc. Their testimony was that McCorkhill was instructed to get the vehicle fixed and if he could not, to call back, and he failed to call back. (Plfts.-Appellees' A. 15, 17 and 19). Although McCorkhill was operating his vehicle upon the heavily traveled U. S. 40 at a pace he compared to a "kiddie car" (Plft. Appellee A. 34), McCorkhill took no steps to warn the motoring public of his crippled vehicle, a vehicle virtually stopped on the highway. (Plft.-Appellee A. 2.) Mr. Schlagenhauf, operating the bus, had come up behind the Stone vehicle which was being operated in an easterly direction in the same lane of travel as the Contract Carriers unit. (Appellants' A. 203.) He signaled his intention to pass (Appellants' A. 203), pulled into the passing lane and proceeded to pass. (Appellants' A. 203.) As he was passing Stone, he observed red lights down the road which he could not describe as to number (Appellants' A. 149-150), which he presumed

to be on a vehicle, but they appeared far enough down the road that they were of no warning or threat to him. (Appellants' A. 149.) He continued to give to the Stone vehicle his attention (Appellants' A. 149) in passing. Stone indicated the bus was safely past and could return to the right-hand lane (Appellants' A. 107) and Schlagenhauf signaled he was returning (Appellants' A. 143), checked the position of the Stone vehicle in his rear view mirror (Appellants' A. 143), resumed his driving position (Appellants' A. 203) and observed the left rear of the Petitioners' vehicle ahead of him. Schlagenhauf swerved hard left but struck the left rear of the truck with about 24 inches of the right front of the bus. (Appellants' A. 205.) Stone hit his brakes, turned left to avoid any contact with vehicles and moved around the colliding vehicles. (Appellants' A. 111-112 and 120.) The time that expired between the time the bus passed the Stone vehicle and the collision was considerably less than eight seconds according to Stone (Plft. Appellee A. 5) and about five seconds according to Schlagenhauf. (Appellants' A. 206.)

We respectfully submit the concurrent findings of the Court of Appeals and the District Court are sufficiently supported by the record, and the Court of Appeals properly fulfilled its function in terms of accepted procedure of appellate review.

III.

The Judgment of the Seventh Circuit Court of Appeals Affirming the Trial Court Is Consistent With the Law of Indiana and the Law of Other States Construing Similar or Identical Statutes.

The judgment of the Court of Appeals is squarely in line with Indiana law and with decisions of appellate courts in other states construing identical or similar low speed statutes.

The Court of Appeals stated:

> "Whether or not, under the circumstances revealed by the record, the operation of the Contract Carriers, Inc. tractor-trailer was at such a low speed as to deceive others upon the highway and to constitute an impediment to traffic must be determined by the trier of the facts." (Petitioners' A. P. 9a.)

This statement by the Court of Appeals in concurring with the findings of the lower court follows Indiana law as clearly set out in *Pohlman* v. *Perry,* 1952, 122 Ind. App. 222, 103 N. E. 2d 911, wherein the Indiana court, construing Section 47-2006 of Burns' Indiana Statutes Annotated, stated at page 915:

> "An examination of this statute also reveals that its application involves a question of fact for the trier of the cause . . . whether or not appellee's speed was unreasonably slow and whether or not traffic upon the highway was unreasonably impeded or blocked by the appellee, were questions of fact for the jury."

The above statement of the Court of Appeals and the Indiana construction of the statute are also supported by decisions in other states construing similar or identical statutes.

Seaton v. *Spence,* (1963), 215 Cal. App. 761, 30 Cal. Reptr. 510.

Templar v. *Tongate,* (1953), 71 Wyo. 148, 255 P. 2d 223.

Lafferty v. *Wattle,* (1961), ... Mo. App. ....., 349 S. W. 2d 519.

Angell v. *Hester,* (1960), 186 Kan. 43, 348 P. 2d 1050.

Griffin v. *Illinois Bell Telephone Company,* (1962), 34 Ill. App. 2d 87, 180 N. E. 2d 228.

Engelson v. *Aanenson,* (1963), 267 Minn. 1, 124 N. W. 2d 360.

Netterville v. *Crawford,* (1958), 233 Miss. 562, 103 So. 2d 1.

The Court of Appeals has not altered or created law for the State of Indiana. Burns' Indiana Statutes Annotated, Section 47-2006, has been the law of Indiana since 1939. *Pohlman* v. *Perry,* (1952), 122 Ind. App. 222, 103 N. E. 2d 911, has been the law of Indiana since 1952.

In effect, the Petitioners argue that a determination under Section 47-2006 as to what constitutes illegal "low speed" should be determined as a matter of law. The Petitioners argue that because the Petitioners' vehicle was equipped with nine red lights, as a matter of law, the Indiana statute could not apply. To follow such an argument would have brought the Court of Appeals in direct conflict with the law of Indiana and the case law of states construing slow speed statutes and in direct conflict with the spirit of slow speed statutes. Had the legislature intended violations of the statute to be determined as a matter of law, a specific speed would have been set out in the statute.

As was stated by the Indiana Appellate Court in *Pohlman* v. *Perry,* page 915:

> "... This statute does not fix a speed which makes its violation negligent as a matter of law ... 'Such a slow speed' is a question of fact."

The Court of Appeals by the decision in this cause has not held that as a matter of law operating at 20-30 miles per hour constitutes a violation under Section 47-2006. The Court of Appeals properly held that the trier of the facts could have so determined under the circumstances then and there existing and that the Court of Appeals could not say, as a matter of law, that such was not a violation. Each case must stand on its own merits, its own facts, on its own circumstances, and thereupon the determination as to violation must be made by the trier of the facts who observed and heard the witnesses.

36 states have adopted legislation identical or similar to Section 47-2006. This legislation is in recognition of the potential hazard created by the slow-moving motorist. Lack of speed as well as speed can be a killer upon heavily traveled public highways. Necessarily whether or not low speed is such that constitutes a violation under statute must be determined upon the circumstances existing at the time. State legislatures have recognized, and particularly Indiana, in Section 47-2006:

> "... except when reduced speed is necessary for safe operation, or in compliance with law."

that there may be legal excuse for low speed; however, there was no showing of legal excuse in the case at bar.

The interpretation of Indiana law by the Court of Appeals is consistent with Indiana law and does not conflict with the interpretation of similar or identical slow speed statutes of other states. Thus the argument of the Petitioners that the decision of the Court of Appeals will create some kind of national confusion amounts to a mere unsupported assertion. Nothing could be more just or equitable than permitting each case to stand on its own facts, on its own merits as determined by the person or persons who heard and saw the witnesses in the trial of the cause.

IV.

There Does Not Exist a Conflict Between Panels of the Seventh Circuit Court of Appeals Nor Has the Court of Appeals Rendered a Decision in Conflict With the Decision of Another Court of Appeals on the Same Matter.

There is no conflict between the decision of the Court of Appeals in this cause and the decision of the Court of Appeals in *U. S. Ex. Rel. Rogers* v. *Lane* (C. A. 7th 1965), 345 F. 2d 357, as argued by the Petitioners.

This is an example of the extreme "reaching" for issues indulged in by the Petitioners.

The Court of Appeals in *U. S. Ex. Rel. Rogers* v. *Lane,* a criminal cause arising out of a habeas corpus proceeding, footnoted *Gediman* v. *Anheuser-Busch* (C. A. 2d, 1962), 299 F. 2d 537, not for the principle propounded by the Petitioners but merely footnoted said case as support for the rule that a conclusion of law may be reviewed by the court, especially when the only evidence received by the court was documentary, and the trial did not involve any question as to the veracity of witnesses.

The assertion that the decision in *U. S. Ex. Rel. Rogers* v. *Lane,* stands for the proposition that a trial judge's determination of negligence is a conclusion of law, when the cause before the Court in *Rogers* v. *Lane* was a criminal matter wherein negligence was not an issue fails for lack of support on consideration.

The judgment of the Court of Appeals in the cause at bar with respect to the treatment on appeal of a trial judge's findings and conclusions with regard to negligence and proximate cause is consistent with other panels of the Seventh Circuit.

Leatherman v. *Gateway* (C. A. 7th, 1964), 331 F. 2d 241.

Parker v. *Heresy* (C. A. 7th, 1961), 295 F. 2d 731.

The Petitioners conclude at pages 15 to 17 of the Petition that there exists a conflict among the circuits with respect to the treatment of the reviewing court of a judge's "determination of negligence." We submit the conclusion reached by the Petitioners is based solely on semantics and the failure of the Petitioners to define what is embodied in a "determination of negligence."

First, we submit that even if the argument of the Petitioners was accepted at face value, which of course we do

not, the Court of Appeals has not "rendered a decision in conflict with the decision of another Court of Appeals on the same matter" (Rules of Supreme Court of the United States—Rule 19); because this litigation has not been the subject of review by any other Court of Appeals. An example of a conflict "on the same matter" would be a difference in interpretation of the validity and scope of a particular patent by two Courts of Appeals such as was the case in *Layne & Bowler Corp.* v. *Western Well Works, Inc.*, 261 U. S. 387, wherein certiorari was granted, then dismissed. The facts in the case at bar have not been considered by another Court of Appeals.

Second, a reading of the case of *Gediman* v. *Anheuser-Busch, Inc.* (C. A. 2d, 1962), 299 F. 2d 537, relied upon by the Petitioners as primary support for their contention of conflict, reveals that the Court in that particular case, in speaking of a judge's "determination of negligence", was referring to the application of the *applicable standard of care,* not evidentiary findings as reflected by the statement of the Court as follows (our emphasis):

> "To us this seems directed to the issue whether the letter of September 17, 1956, met the applicable standard of care—not whether Barsi relied on it, as to which a much fuller discussion of the evidence would have been needed. If we are right in so reading the opinion, we are in no way concluded by it."
>
> *Gediman* v. *Anheuser-Busch, Inc.* (C. A. 2d, 1962), 299 F. 2d 537 at 547.

Thus the Court in *Gediman* v. *Anheuser-Busch, Inc.*, in using the words "determination of negligence" was referring to the trial court's determination and application of the appropriate legal standard. There is no contention by the respondents nor by the Seventh Circuit Court of Appeals that the reviewing court must accord a judge's determination of the *applicable legal standard* the protection of the "Unless Clearly Erroneous" Rule.

The Second Circuit in the later 1963 case of *Castro* v. *Moore-McCormack Lines, Inc.* (C. A. 2d, 1963), 325 F. 2d 72 at page 75, in specially considering the question recognized and clarified this question, stating that if the trial court misapplied the law in reaching his conclusory findings, such findings may be set aside.

> "There is no real inconsistency, we think. It is merely a question of separating the legal from the factual elements involved in the conclusory statements where these involve a mixture of law and fact. Thus, as is implicit in what we have already said in this opinion, if the trial judge, in assaying the proofs, including questions of credibility and the drawing of inferences of fact, can be shown to have arrived at his conclusory findings by a misapplication of the law, we must set aside the findings thus made."

Thus again we see the Court in the Second Circuit is speaking of "determination of negligence" as review of the applicable legal standard, not the evidentiary findings of the trial court.

The Fourth Circuit case of *Olah* v. *S. S Jaladurga* (C. A. 4th, 1965), 343 F. 2d 457, cited by the Petitioners as additional authority for a conflict between circuits, is distinguished from the case at bar in view of the fact in *Olah* v. *S. S. Jaladurga* the facts were not in dispute. However, the Court concluded in harmony with other circuits that a judge's findings distilled from evidentiary facts are secured by the "clearly erroneous" precept.

> "Of course, when an ultimate conclusion is to be drawn from evidentiary facts already agreed or found, but the answer is also dependent upon a selection of factual inferences which are reasonably deductible from the underlying facts, the conclusion is one of fact. . . . In that event the conclusion is secured by the 'clearly erroneous precept."

These decisions do not reflect a real and embarrassing conflict between the Circuit Courts of Appeals.

These decisions make it clear that the Court of Appeals on review should accord the evidentiary findings of the trial court, with respect to negligence and proximate cause, the "unless clearly erroneous" precept, but the Court of Appeals may freely review the legal standard applied by the trial court.

These rules of appellate review were followed by the Court of Appeals in considering and approving the evidentiary finding of the trial court contained in Finding of Fact No. 11 and approving the standards of conduct applied by the trial court contained in Burns' Indiana Statutes Annotated, Section 47-2006 and the common law of the State of Indiana as more fully argued under Paragraph II of this Argument.

There, therefore, exists no conflict between the judgment in the case at bar and the decisions of other Courts of Appeal.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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